APPEAL NO. 93070

This appeal arises under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). A contested case hearing (CCH) was held in (city), Texas, on November 4, 1992, (hearing officer) presiding, to determine the following issues: (1) did respondent (carrier) properly contest the compensability of the injury within 60 days, or did it waive the right to dispute the injury; (2) did appellant (claimant) sustain an injury in the course and scope of his employment on (date of injury); (3) did claimant report the injury of (date of injury) to Scobey Moving and Storage (employer) within 30 days after the date of the injury; (4) were claimant's knee problems a result of the injury of (date of injury), or were they the result of a subsequent nonoccupational injury; (5) what was claimant's average weekly wage; and (6) when has claimant had disability since the date of the injury. The hearing officer ruled that the first four issues were *res judicata* (a thing judicially acted upon or decided, Black's Law Dictionary, sixth edition) because at a prior CCH held on June 1, 1992 to resolve a disputed issue as to whether claimant was an employee of employer, the hearing officer, in concluding claimant was an employee, found that his knee was injured on (date of injury) at work. The hearing officer reasoned that certain factual findings and legal conclusions made in his decision after the first hearing--from which no appeal was taken (Article 8308-6.42(d))--resulted in the determination of issues (2) and (4) and the waiver of issues (1) and (3) for not having been timely raised as disputed issues at the first hearing.

Claimant did not object to the *res judicata* ruling at the hearing nor does he raise it as an appealed issue. Claimant also does not appeal the hearing officer's determination of claimant's average weekly wage, but does challenge the determination that he did not have disability (Article 8308-1.03 (16)) resulting from his (date of injury) injury.

The carrier objected to the *res judicata* ruling at the hearing, apparently wanting to dispute the compensability of the claim. In its response, carrier appears to challenge so much of that ruling as prevented carrier from disputing at the second hearing the compensability of the injury. The carrier also supports the hearing officer's determination of the disability issue.

DECISION

Finding no reversible error and the evidence sufficient to support the hearing officer's findings and conclusion regarding the issue of claimant's disability, the decision is affirmed.

Insofar as carrier's response to claimant's request for review may also have been intended as an appeal of the hearing officer's *res judicata* ruling preventing carrier from contesting the compensability of the claim at the second hearing, such appeal is untimely and thus will not be considered. *See* Article 8308-6.41(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3 (Rule 143.3). *See also* Texas Workers' Compensation Commission Appeal No. 92490, decided October 28, 1992. Further, Article 8308-5.21(c) provides that an insurance carrier's notice of refusal of a claim must specify the grounds for

such refusal, and that the ground or grounds specified in the notice constitute the only basis for the carrier's defense on the issue of compensability in a subsequent proceeding unless the defense is based on newly discovered evidence that could not reasonably have been earlier discovered. *See generally* Texas Workers' Compensation Commission Appeal No. 92359, decided September 9, 1992, and Texas Workers' Compensation Commission Appeal No. 92268, decided August 6, 1992.

In the earlier hearing, the hearing officer found that on or about (date of injury), claimant was working on a move with another employee when a large box came sliding down a ramp and struck claimant in the knee causing an injury. The hearing officer concluded that claimant was an employee of employer when he injured his knee. At the hearing which is the subject of this appeal, claimant testified that he was unable to work after his knee was injured on (date of injury); that he did not seek medical treatment for his injured knee after August 1st because the insurance carrier would not pay for it; that while he did hurt his knee shooting a basketball in December 1991 and sought medical treatment for the first time on January 4, 1992 at the (ER), the knee was sore before that event; that the ER doctor referred him to another doctor whom he saw and who recommended knee surgery; that in May 1992, his knee "popped out" when he descended a staircase and he again went to the ER for treatment; and that he saw Dr. S at the request of the carrier who concurred in his need for surgery and diagnosed an anterior cruciate ligament tear.

The ER record of January 4, 1992 stated the chief complaint as right knee pain from playing basketball. The ER record of May 4, 1992 states the chief complaint as knee "gave out" while descending stairs that morning and was now swollen and painful. It also referred to a knee injury in July 1991. An affidavit from a person who lived below claimant's apartment said he witnessed claimant playing basketball on December 30, 1991 and twisting and injuring his "left" knee. This affiant also stated that before the basketball injury, claimant "did not have any problems with his legs or knees. . . .[and] had no problems playing basketball and did not have any problems walking around." The medical record of January 4th, however, indicates it was claimant's right and not his left knee that was injured.

Claimant also testified that with the exception of approximately four to six weeks of work as a telephone solicitor, he has not worked since (date of injury); that the work he knows how to do is tending bar and working construction but that he cannot stand for long periods of time and cannot climb ladders. Claimant also testified that he had not sought other work because he expected to receive workers' compensation benefits and did not realize the process would take so long. Claimant's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) stated the date lost time began as "1-3-92" but claimant said he only signed the form and did not know who filled it out.

The hearing officer found that claimant did not seek medical treatment after his (date of injury) injury until January 4, 1992; that no medical care provider took claimant off work

because of his injury on (date of injury); and that there was no credible evidence that claimant was unable to obtain or retain employment as a result of his injury of (date of injury). Based on those findings the hearing officer concluded that claimant did not show that he had disability as a result of his injury of (date of injury). Article 8308-6.34(e) provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence, but also of its weight and credibility. As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer may believe all, part, or none of the testimony of a witness (Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.)) and may believe one witness and disbelieve others (Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.)). Though not obligated to accept the testimony of a claimant, an interested witness, at face value (Garza, *supra*), issues of injury and disability may be established by the testimony of a claimant alone. *See e.g.* Texas Workers Compensation Commission Appeal No. 91083, decided January 6, 1992, and Texas Workers' Compensation Commission Appeal No. 92069, decided April 1, 1992. As an interested party, the claimant's testimony only raises an issue of fact for determination by the fact finder. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.- Amarillo, no writ). We do not substitute our judgement for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge